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No. 93-697

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

SNAP-ON TOOLS CORPORATION, TIM KASH, and RAY PARK,

Petitioners,

v.

DAN EULRICH, VIRGINIA EULRICH, and DEPARTMENT OF JUSTICE OF THE STATE OF OREGON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OREGON

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the pre-trial, trial and post-trial procedures for review of punitive damages awards in Oregon violate the Due Process Clause.

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RESPONDENTS' BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals of Oregon, (Petition at A-1) is reported at 121 Or. App. 25, 853 P.2d 1350. The Supreme Court of Oregon denied a petition for review, which was unreported.

JURISDICTION

The Supreme Court of Oregon denied petition for review on September 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

STATEMENT

The summary of the relevant facts of this case provided by petitioner has been overgeneralized as well as painted in a light wholly in favor of petitioners' position and in a manner inconsistent with the evidence presented at trial by the respondents, Dan and Virginia Eulrich.

Contrary to the petitioners' view, both the jury and the Oregon Court of Appeals found that Snap-On and its employees had engaged in aggravated fraudulent conduct with respect to their relations with respondents, Dan and Virginia Eulrich, from the inception of that relationship in which they fraudulently induced the Eulrichs into becoming Snap-On Tool distributors, throughout the

duration of the relationship when the evidence showed Snap-On, acting through its employees, coerced a purported release from Dan Eulrich in a high pressure meeting terminating the distributorship.

The Petitioners' statement that the respondents only suffered an out-of-pocket loss of $10,000 (Petition at 3) is wholly unsupported by the evidence and is consistent with petitioners' continual mischaracterization of the facts throughout this proceeding.

As was explained in detail in the Court of Appeal's opinion, the evidence showed that the Eulrichs were fraudulently induced to enter into a Snap-On Tool distributorship with petitioners as a part of Snap-On's nationwide scheme whereby the company routinely and regularly recruits naive, unexperienced and unsuspecting individuals into investing substantial sums of money into distributorships utilizing a consistent pattern of misrepresentations. These representations include false representations of the amount of income Snap-On Tool distributors can expect to earn, false reporting of expenses Snap-On distributors can expect to incur in operating a distributorship, omissions with respect to failure rates, false representations as to the amount of customers which will be in a distributor's territory, misrepresentations about the marketing, support and financial expertise which would be given dealers, etc. The evidence at trial was overwhelmingly against petitioners, and supported the respondents' position that the recruitment of the Eulrichs was an overall part and parcel of the nationwide scheme engaged by Snap-On Tools to expand its dealer network in order to

substantially increase its profits. This expansion was done without concern for whether these newly acquired distributors could survive financially given the significantly reduced territories they were "awarded." As a result of these practices, the evidence at trial showed that numerous dealers who were fraudulently induced to invest their life savings, or significant portions of their estates into these distributorships, failed in their distributorship businesses, causing them significant hardship and grief.

The financial damages to the Respondents herein totalled over $450,000, which damages have been affirmed by the Oregon appellate courts. A more complete history of the petitioners' pattern and practice of fraud and misrepresentation is contained in the opinion of the Court of Appeals which appears in the appendix to the Petition for Writ of Certiorari.

RESPONSE TO REASONS FOR GRANTING THE WRIT

I. PETITIONERS' ARGUMENTS WERE NOT PROPERLY RAISED AT THE TRIAL COURT

At the outset respondents respectfully submit that petitioners' overbroad statement that the Oregon Constitution prohibits judicial review of punitive damages is simply an incorrect statement of Oregon law. This statement ignores Oregon case law on the issue and particularly an in-depth opinion rendered by the Oregon Supreme Court in the case of *Oberg v. Honda Motor Company*, 316

Or. 263, 275 et. seq., 851 P.2d 1084 (1993)[1]. Such a statement by petitioners, however, typifies their consistent practice of mischaracterizing law and fact throughout this case.

A punitive damage claim and ultimate award can be reviewed at several places in the proceeding in Oregon. Initially, a party seeking punitive damages must be able to plead in good faith operative facts giving rise to a claim for punitive damages. Trial judges in the State of Oregon have wide latitude to strike punitive damages claims at the pleading stage for failure on the part of a party to be able to plead the requisite operative facts.

Thereafter, during the pre-trial phase, after discovery is closed, a party opposing punitive damages may ask a trial judge to strike the punitive damage claim based upon the failure of the claimant to elicit evidence of sufficiently aggravated conduct to allow the issue of punitive damages to go to trial. This may be done in a motion for summary judgment under the Oregon Rule of Civil Procedure 47.

Thereafter, at trial a plaintiff, under Oregon law, must present by clear and convincing evidence a prima facie case to establish that there is a factual basis for his punitive damage claim. Or. Rev. Stat. 41.315(1). In other words, the claimant must present evidence of sufficiently aggravated conduct to justify an award of punitive

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[1] A Petition for Writ of Certiorari in the *Oberg* case has been filed, No. 93-644. Respondents herein concur in and adopt the arguments made in the Respondent's Brief in Opposition in the *Oberg* case.

damages to punish and deter the defendant and others. *State ex rel Young v. Crookham*, 290 Or. 61, 65, 618 P.2d 1268 (1980). It must be shown by the clear and convincing evidence standard, not a mere preponderance of the evidence standard, that there is a prima facie case of fraud or other misconduct entitling that party to proceed ahead with the punitive damage claim. Thus, a trial judge may, after hearing evidence presented by a punitive damage claimant, rule that the evidence is not substantial enough to allow the plaintiff to proceed forward with his punitive damage claim. It is incumbent upon the trial judge not to permit the punitive damage claim to be submitted to a jury without the prima facie showing mentioned above.

Thereafter, assuming the evidence is sufficient to persuade the trial judge that punitive damages may be appropriate in the case, the amount of punitive damages to be submitted to the jury can be controlled by the trial judge based upon the amount of actual damage proven by the claimant. Thus, if a claimant has only shown actual damages of a few thousand dollars, a trial judge would have within his discretion the power to limit punitive damages which he would allow to go to the jury.

The second stage at which a punitive damage award can be reviewed is after the verdict on appeal. It is true that the review of a punitive damage award on appeal is limited by the Oregon Constitution, however this limitation is no greater than that which applies to any damage award returned by a jury. As petitioners

correctly point out at pages 2 and 3 of the Petition, there is post-trial review of punitive damage awards both as to trial court error and for a determination by the appellate court whether there is any evidence in the record to support the verdict. This standard requires that there be some substantial evidence in the record to support the verdict, including the amount thereof. Thus, substantial due process review of punitive damage awards in Oregon does exist, despite the petitioners' assertion to the contrary.

Starting with their initial complaint, respondents alleged their right to punitive damages of $2.5 million on each of the two relevant claims. Petitioners never moved the trial court to reduce the amount of the punitive damages claims, or otherwise lessen the amount as being inconsistent with the respondents' proof of actual damages. Petitioners moved for a directed verdict, but only on the ground that there was no evidence to support any punitive damages, but not on the ground that the amount was excessive.

The petitioners did not argue that the amount of punitive damages prayed for was excessive, even when the respondents moved, at the end of the evidence, to double their prayer for punitive damages. The petitioners argue to this Court that Oregon law deprives them of an opportunity to have the punitive damage award reviewed for excessiveness, but they did not make this argument at the only time when the trial court could have granted them the relief they now seek, that is, prior to the jury being instructed. In fact, the petitioners have conceded that the jury was

properly instructed, and this includes the instruction that the jury could award up to nine million dollars in damages.

Only after the verdict was received and punitive damages awarded did the petitioners file a motion for judgment notwithstanding the verdict, claiming for the first time that the amount of the punitive damages claimed and awarded was excessive. In that motion they alleged, as one ground for relief, that the award of punitive damages "denied defendants due process of law."

Oregon Rule of Civil Procedure 63A provides that a motion for a judgment notwithstanding the verdict cannot be granted when the party has not made a motion for a directed verdict on the same ground for which it seeks a judgment n.o.v. *Johnson v. Smith*, 24 Or. App. 621, 624, 546 P.2d 1089 (1976).

Thus the petitioners did not timely raise their objections to the excessiveness of the claim for and award of punitive damages. Because petitioners did not ask the trial court to limit the amount of the punitive damages claim submitted ot the jury, they thereby failed to avail themselves of the most important procedure available in Oregon for protection against excessive punitive damage awards, and should not be now heard to complain of the award.

II. EVEN IF THE ARGUMENT HAD BEEN PROPERLY RAISED, OREGON'S PUNITIVE DAMAGE LAWS ARE CONSTITUTIONAL

If this Court should decide to consider petitioners contentions despite petitioners' failure to timely assert them, their arguments are

nevertheless unfounded.

The crux of petitioners' argument is that Oregon law violates this Court's opinions in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711 (1993). Petition, page 5. Petitioners argue that "excessiveness can only be reviewed after a jury verdict," and that *TXO* therefore requires "adequate post trial review." *Id.*

As discussed in the section above, this argument is wrong on two counts. First, excessiveness can be reviewed and controlled at several stages before the verdict by motions to limit the amount of (or completely eliminate) the claim for punitive damages. Petitioners failed to avail themselves of these procedures.

Second, there is post-trial review of the amount of the punitive damages award in that there must be some evidence in the record to support the award, including the amount thereof. Petitioners could have received this review by the Oregon Court of Appeals and the verdict was affirmed.

Petitioners are making essentially the same argument they made at the Oregon Court of Appeals before this court decided *TXO*. There they argued that "[u]ntil the United States Supreme Court decided *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032 (1991), it was settled law in Oregon * * * that a verdict for punitive damages could not be set aside for excessiveness and was not reviewable. * * * In *Haslip* the Court prescribed constitutional standards for punitive damages that Oregon law, constrained by Article VII, Section 2 (Am.) does not meet."

Appellants' Reply Brief, page 14.)

The flaw in this argument is that *TXO* did not announce any new standard of review for punitive damages; in *TXO* this Court followed *Haslip*. In *Oberg v. Honda Motor Co.*, 316 Or 263, 275 et. seq, 851 P2d 1084 (1993), the Oregon Supreme Court held in a thorough opinion that the Oregon procedures for reviewing punitive damages awards were consistent with the requirements of *Haslip*. Further, as noted above, petitioners admit that the instructions which were given were "constitutionally sufficient." (Appellants Reply Brief, page 14, n.8.)

Therefore, Oregon's laws and procedures relating to the award of punitive damages are consistent with the Due Process Clause and this Court's opinions in both *Haslip* and *TXO*, and the petitioners' arguments to the contrary should be rejected and the writ denied.

III. THE PUNITIVE DAMAGE AWARDS WERE NOT EXCESSIVE

Finally, in actual fact, this punitive damage award was not excessive in relation to the compensatory damage award, and under the standards announced by this Court.

On the fraud claim, the jury awarded $100,000 in compensetory damages and $4,750,000 in punitive damages; for the breach of the covenant of fair dealing it awarded $100,000 compensatory damages and $3,700,000 punitive damages. This is a ratio of 47.5 to 1 punitive damages to compensatory on the first claim, and 37 to 1 on the second claim. In *TXO Production Corp. v. Alliance Resources*

Corp., supra, the case upon which petitioners rely to reverse this case, a majority of this Court upheld a verdict of $19,000 compensatory damages and $10,000,000 punitive damages, a ratio of 526 to 1.

Justice Stevens, writing for three of the Justices in *TXO*, was of the opinion that the punitive damages were not excessive because of the "potential harm that might result from the defendant's conduct" as well as the harm actually incurred; the "possible harm to other victims;" and that petitioner's conduct was "part of a larger pattern of fraud, trickery and deceit." As noted above, and in the Court of Appeals decision, there was ample evidence of this conduct in the present case.

Justice Kennedy concurred that the punitive damages were not excessive because "TXO acted with malice." There was evidence in the instant case that the petitioners "acted with malice." Justice Scallia, joined by Justice Thomas, was of the opinion that there is no substantive due process requirement that punitive damages be reasonable.

There was ample evidence in the instant case to support similar findings against the petitioners herein.

IV. CONCLUSION

In conclusion, the factual picture painted by the petitioners in their Petition for Review is very different from the actual facts of this case. The petitioners' fraud was intentional, a general pattern and practice of their business, and clearly supported the award of

punitive damages. The petitioners further failed to properly preserve the arguments they are now making against the punitive damage awards. Even if those arguments had been preserved, they are not persuasive. Contrary to petitioners' arguments this Court in *TXO* did not change the law which existed at the time of the Oregon Supreme Court's decision in *Oberg*, and that court approved a punitive damage award much greater (in relation to the compensatory damages) than that made in the instant case.

Indeed, it is temerarious of petitioners to seek this review in light of the *Oberg* opinion, which dealt squarely with these issues in a responsible, analytical and perceptive manner, mindful of this honorable Court's recent pronouncements.

Therefore the Petition for Writ of Certiorari should be denied.

Dated: December 14, 1993

Respectfully submitted,

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